

CANADA / JUDGMENT

Jiang v. Oei

2020 BCSC 1890

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Supreme Court of British Columbia

DECIDED

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2020 BCSC 1890 Jiang v. Oei

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Jiang v. Oei,

2020 BCSC 1890

Date: 20201203

Docket: S159351

Registry: Vancouver

Between:

Yicheng Jiang

Plaintiff

And

Paul Oei, Loretta Lai, Canadian Manu Immigration & Financial Services Inc.,

Cascade Renewable Organic Fertilizer Corp., Organic Eco Centre Corp.,

Joseph E. Peschisolido, Joseph E. Peschisolido Law Corporation dba

Preschisolido & Compnay and Yvonne Y. Hsu

Defendants

And

Paul Oei, Loretta Lai, Desjardins Financial Securities Investments Inc./

Desjardins Securite Financiere Investissements Inc.,

Desjardins Financial Security Life Assurance of Canada/

Desjardines Securite Financiere Compagnie D'Assurance Vie;

and Yicheng Jiang

Third Parties

And

Paul Oei, Loretta Lai, Canadian Manu Immigration & Financial Services Inc., Joseph E. Peschisolido, and Peschisolido Law Corporation dba

Peschisolido & Company

Fourth Parties

Before: The Honourable Mr. Justice Skolrood

Reasons for Judgment

Counsel for the Plaintiff via videoconference:

N. Muirhead

N. Yan

Counsel for the Defendant, Yvonne Hsu

via videoconference:

C. Dennis, Q.C.

Counsel for the Defendants,

Joseph E. Peschisolido and Peschisolido Law Corporation dba Peschisolido & Company

via videoconference:

J.G. Dives, Q.C.

The Defendant Paul Oei on his own behalf and as agent for the Defendants Loretta Lai, Canadian Manu Immigration & Financial Services Inc., Cascade Renewable Organic Fertilizer Corp. and Organic Eco-Centre Corp.

via videoconference:

P. Oei

Place and Date of Trial/Hearing:

Vancouver, B.C.

November 4, 2020

Place and Date of Judgment:

Vancouver, B.C.

December 3, 2020

- [1] This is an application by the plaintiff pursuant to R. 9-1(5)(d) of the Supreme Court Civil Rules to strike portions of the response to civil claim filed by the defendants Paul Oei, Canadian Immigration & Financial Services Inc., Cascade Renewable Organic Fertilizer Corp., and Organic Eco-Centre Corp. (together the "Oei Defendants") and to enter judgment against those parties.
- [2] The Oei Defendants, together with the defendants Joseph E. Peschisolido and Peschisolido Law Corporation dba Peschisolido & Company (together "Peschisolido") and Yvonne Hsu ("Hsu"), oppose the application.
- [3] For the reasons set out below, the plaintiff's application is dismissed. Given this conclusion, I will provide only a brief overview of the background facts and will avoid making findings of fact other than as necessary to determine the application.
- [4] The trial of this action is currently scheduled to commence January 18, 2021 and run for five weeks.

Background

BC Securities Commission Proceeding

- [5] The plaintiff's application flows out of proceedings before the British Columbia Securities Commission (the "Commission") in which the defendant Oei was found to have promoted and operated a fraudulent investment scheme. The Commission proceeding was held pursuant to provisions of the Securities Act, R.S.B.C. 1996, c. 418 [Act].
- [6] In order to better understand the nature and scope of the Commission proceeding, it is useful to refer to some key passages from its decision, which can be found in Re Oei, 2017 BCSECCOM 365 (the "Decision"), dated December 12, 2017.
- [7] The focus of the proceeding is described in paras. 2-3:
- [2] In a notice of hearing issued September 26, 2016 the executive director alleged that, between July 2009 and August 2013, the respondents directly or indirectly, engaged in or participated in conduct in relation to the securities of Cascade Renewable Carbon Corp. (CRC), Cascade Renewable Organic Fertilizer Corp. (CROF) (CRC and CROF, collectively, Cascade) and Organic Eco-Centre Corp. (OEC) when they knew, or reasonably should have known, that the conduct perpetrated fraud, contrary to section 57(b) of the [Securities Act].
- [3] In particular, the notice of hearing alleges that:

- a) Oei and the corporate respondents (other than OEC) raised approximately \$13.3 million through 64 investments;
 - b) these investors were told that their funds would be forwarded to Cascade and that Cascade would then use those funds for start-up costs;
 - c) less than \$6.4 million of the investors' funds were transferred to Cascade and the respondents (other than OEC) used the remaining funds on expenses unrelated to Cascade;
 - d) Oei subsequently solicited the same investors who had invested the original \$13.3 million to invest in OEC and did not tell the investors that less than half of their original investments had been given to Cascade;
 - e) Oei and OEC raised \$202,000 from 18 investors; and
 - f) as a consequence of the above:
 - i) Oei committed 82 contraventions of section 57(b) of the Act;
 - ii) Canadian Manu Immigration & Financial Services Inc, (Canadian Manu) committed 64 contraventions of section 57(b) of the Act;
 - iii) 0863220 B.C. Ltd. Ltd. (0863) committed 34 contraventions of section 57(b) of the Act;
 - iv) 0905701 B.C. Ltd. (0905) committed 30 contraventions of section 57(b) of the Act; and
 - v) OEC committed 18 contraventions of section 57(b) of the Act.
- [8] Oei was the principal and controlling mind of each of the corporate entities referred to in the Decision.
- [9] As noted in the Decision, the executive director called 10 witnesses and the respondents, who were represented by counsel, called one witness. Both parties tendered documentary evidence and provided written and oral submissions.
- [10] The plaintiff herein was one of the witnesses called by the executive director. He is referred to in the Decision as "Investor A". His evidence is summarized in the Decision at paras. 65-74, where it is noted at para. 74 that he invested US \$3.72 million in CRC (the equivalent of CDN \$4 million) as part of a group with six other investors. Of the 10 witnesses called by the executive director, nine were investors in the scheme promoted by Oei.
- [11] After an extensive review of the evidence and the law, the Decision sets out the Commission's findings on the "prohibited act", that is, the conduct alleged to have contravened the Act:

- [285] We find that the executive director has proven, on a balance of probabilities, that the prohibited act of deceit or other fraudulent conduct was carried out with respect to 63 investments in Cascade. Investors were told one thing about the use of funds and the respondents did something very different with \$5,003,088 of those funds. The respondents misappropriated these funds and used them for their own purposes and not as the investors were told they would be used.
- [286] The evidence is clear that Oei and Canadian Manu were involved in the prohibited conduct with respect to all 63 of these investments. Oei met with all of the investors and made representations (orally or in writing) to those investors with respect to the intended use of their invested funds. Oei was also the person who controlled all of the flow of the investors' funds. Canadian Manu was involved, through the indirect investment structure, with all 63 of the investments and was the primary conduit of most the investors' funds. 0863 and 0905 were involved in the prohibited conduct with respect to 33 and 30 of these investments, respectively, in that they were involved in the indirect investment structure for that number of investments. Oei was the person who controlled each of Canadian Manu, 0863 and 0905.
- [12] The Commission went on to find that the executive director had also established that the prohibited act of deceit or other fraudulent conduct committed by Oei and the related entities had caused a deprivation for the purposes of the Act.
- [13] There was a subsequent penalty hearing conducted by the Commission on May 15, 2018 and the Commission issued its penalty decision on August 8, 2018: *Re Oei*, 2018 BCSECCOM 231. While the penalty decision is not directly relevant to the issues on this application, I note that the Commission issued a number of orders against Oei and the various corporate entities including an order permanently banning Oei from trading securities, an order that Oei pay the Commission \$3,087,977.41 pursuant to s. 161(1)(g) of the Act and an order imposing an administrative penalty on Oei of \$4.5 million.

Plaintiff's Civil Action

- [14] The plaintiff filed his notice of civil claim commencing this action on November 10, 2015. It was subsequently amended on August 29, 2017; May 29, 2019; and April 22, 2020.
- [15] As can be seen from the style of cause in the plaintiff's further amended notice of civil claim, in addition to the Oei Defendants, all of which were parties to the Commission proceeding, the civil claim names as defendants Oei's wife, Loretta Lai, as well as Peschisolido and Hsu.
- [16] Peschisolido and Hsu are lawyers who acted for Oei in respect of the CRC investment scheme. The plaintiff's claims against the lawyers are, generally speaking, that:
- a) they negligently prepared investment documents including documents used to solicit funds from the plaintiff and other investors;

- b) they held the investment funds in trust and owed a duty to the plaintiff to disburse the funds in accordance with certain trust conditions, which duty they breached; and
- c) they knowingly participated in a breach of trust by permitting investment funds to be paid for purposes inconsistent with the trust conditions or, alternatively, they were negligent in doing so.

The Plaintiff's Application

- [17] As noted at the outset, the plaintiff applies to strike portions of the response to civil claim filed by the Oei Defendants on the basis that it would be an abuse of process to permit relitigation of the Commission's findings of fraud. While the notice of application also seeks judgment against the Oei Defendants, the plaintiff's counsel fairly acknowledged at the hearing that the Commission findings are not sufficient to support granting judgment in favour of the plaintiff.
- [18] The plaintiff relies upon the well known decision of *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 [C.U.P.E.]. There, an individual, "O", was charged and convicted of sexual assault while employed by the City of Toronto. His conviction was affirmed on appeal. The City fired O shortly after he was convicted. O grieved his dismissal through the appellant union. At the arbitration hearing, the City submitted the complainant's testimony from the criminal trial along with evidence of the conviction, however the complainant was not called to testify. O did testify and denied the sexual assault. The arbitrator held that the presumption raised by the criminal conviction had been rebutted and that O had been dismissed without cause.
- [19] The Divisional Court quashed the arbitrator's ruling and the Court of Appeal upheld that decision. The Supreme Court of Canada dismissed the appeal on the basis that it would be an abuse of process to permit relitigation of the criminal conviction.
- [20] Justice Arbour, writing for the majority, described the abuse of process doctrine:

37 In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, per Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:

The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).

One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. [Emphasis added.]

As Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice .

[21] She went on to say:

51 Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.

52 In contrast, proper review by way of appeal increases confidence in the ultimate result and affirms both the authority of the process as well as the finality of the result. It is therefore apparent that from the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original result should not be binding in the new context. This was stated unequivocally by this Court in *Danyluk*, supra, at para. 80.

[22] The plaintiff submits that none of the factors identified by Justice Arbour supporting relitigation of an issue exist in this case and that to allow the Oei Defendants to contest the Commission's findings of fraud in the civil claim would amount to an abuse of process.

Discussion

- [23] I do not accept the plaintiff's position. In my view, it would be inappropriate in the circumstances of this case to hive off the plaintiff's claims against the Oei Defendants by effectively gutting their response to civil claim and then permitting the balance of the claims against the other defendants to proceed to trial. I reach this conclusion for the following reasons.
- [24] The plaintiff's claims against all of the defendants, and the factual underpinnings to those claims, are inextricably bound up together. The courts have long warned against the dangers of litigating slices of an action when doing so may materially impact the balance of the litigation. Madam Justice Griffin, as she then was, made this point the context of a summary trial in *Greater Vancouver Water District v. Bilfinger Berger AG*, 2015 BCSC 485:
- [96] The extensive experience with this procedure in BC identifies that litigation in slices is most feasible if the slice can be made cleanly but is less advisable when the issues sought to be determined first are intertwined with the issues remaining.
- [97] When an issue in litigation is inextricably interwoven with the remaining issues, the courts in BC have often found it inappropriate to determine the issue first by way of summary trial. As but a few examples of this:
- a) *Prevost v. Vetter*, 2002 BCCA 202 [Prevost], in which the Court of Appeal held that determining whether a duty of care existed and was breached, in a social host liability case, was inappropriate by way of summary trial. This was because the facts necessary to decide those issues also were facts necessary to determine the outstanding issue of causation, giving rise to the potential for inconsistencies and for reconsideration of the facts when the subsequent issues were tried, all to the prejudice of the defendants: at para. 8, 24-26. It was also a factor that the issues were controversial and novel, as in *Bacchus*.
 - b) *Parsons v. Finch*, 2003 BCCA 409, in which the Court of Appeal held that the chambers judge erred in determining by summary trial the issue of whether a municipality which had issued a building permit for the building of a house owed a duty of care to the homeowners in relation to soil conditions. The Court of Appeal held that summary trial determination of the issue was not appropriate, both because it did not assist in the efficient resolution of the proceeding and because the homeowners had been deprived of the opportunity at trial of calling evidence on the standard of care, which evidence could overlap with the duty of care issue even though the issues are distinct.
 - c) *Kaspersky Lab, Inc. v. Bradshaw*, 2010 BCSC 68, in which the plaintiff sought summary trial determination of amounts owing to it under contract. It said that a counterclaim by the defendant was barred by the contract. The Court found that it would be unjust to decide the issue by way of summary trial because it was based on breach of contract yet the counterclaim also alleged breach of contract and the issues were inextricably intertwined: at paras. 22-24.

- d) *Tembec Industries Inc. v. Lucidyne Technologies, Inc.*, 2003 BCSC 802 [Tembec], which involved an application for partial summary judgment by a defendant being sued in relation to alleged faulty equipment it had sold. The defendant argued that an exclusion clause in the contract with the plaintiff defeated the claims. The Court concluded that the matter was not suitable for determination by summary trial because the contractual limitation of liability clauses could not be considered in isolation, and a court would need to look at facts relevant to the entire context of the agreement: at para. 31.
 - e) *SmartCentres Inc. v. EBA Engineering Consultants Ltd.*, 2014 BCSC 2271 [SmartCentres], also involving a determination of the applicability of a limitation of liability clause in a contract.
 - f) *Coast Foundation Society (1974) v. Currie*, 2003 BCSC 1781 [Coast Foundation], also involving a contractual limitation of liability clause.
- [98] As is seen by the above authorities, if the evidence in relation to the issue for which summary trial is sought, and findings in relation to that evidence, could have a material impact on the trial of the remaining issues, and evidence regarding the remaining issues could have a material impact on the issue for which summary trial is sought, the issues are interwoven and not easily separated. In such a case an application judge will rarely have confidence that summary trial of a partial issue will be fair and just.
- [25] The relationship of Oei to the plaintiff and their interactions leading to the plaintiff's investment, as well as the circumstances surrounding the actual investment, are central to the plaintiff's claims against all of the defendants and to the defences raised. Thus, even if large portions of the Oei Defendants' response to civil claim are struck, the remaining defendants will be entitled to canvass all of the relevant facts at trial, including challenging findings of fact made by the Commission in their absence. In the circumstances, the principles of efficiency, judicial economy, and the interests of justice demand that the facts and issues between all of the parties be heard and determined together.
- [26] Further, the findings of the Commission are not dispositive of nor do they align completely with the plaintiff's claims against the Oei Defendants in the civil action. For example, the Commission found that approximately \$5 million of the approximately \$13 million raised from investors was misappropriated by the Oei Defendants, however the Commission did not find that the amounts claimed by the plaintiff were part of the misappropriated funds. Indeed, the Commission did not address the individual losses of any of the investors but rather dealt with the investment funds on a collective basis.
- [27] At the trial of this action, the plaintiff will have to establish that the funds he invested were in fact misappropriated. It will be open to the Oei Defendants as well as the other defendants to challenge that assertion. It would not be an abuse of process for them to do so given this issue was not decided by the Commission.

- [28] There are, as well, issues regarding the ability of the plaintiff to advance a claim for damages on behalf of himself and six other individuals and whether the plaintiff was involved in illegal activities in making the investment. Oei raised this latter point in his oral submission on the present application, although he has not pleaded it in his response to civil claim. Hsu has pleaded it and has alleged the plaintiff was engaged in an illegal international money laundering scheme. This was not addressed by the Commission and will be a live issue at trial.
- [29] Moreover, as submitted by Hsu, the plaintiff seeks to strike numerous paragraphs of the Oei Defendants' response to civil claim that either deny or allege facts that are not the subject of contrary findings by the Commission. There is thus no basis upon which to strike those paragraphs in the response. Numerous examples of facts pleaded by the Oei Defendants that are not contradicted by Commission findings are set out in the chart attached to the written submissions of Hsu. It is not necessary to go into any more detail about these inconsistencies other than to note that I accept Hsu's submission on this point: see *Glover v. Leakey*, 2018 BCCA 56 at paras. 40-41.
- [30] Perhaps most fundamentally, the Commission hearing was a regulatory proceeding brought under the Act. It did not involve many of the defendants herein and had a fundamentally different purpose from this civil action.
- [31] In this regard, it is useful to contrast this case with *C.U.P.E.* There, the individual O sought to relitigate, and indeed to contradict, the central factual finding at his criminal trial that he had committed sexual assault. As noted by Justice Arbour at para. 54, the principle of finality is particularly important in the criminal law context.
- [32] Here, the Commission proceeding focussed on whether the Oei Defendants breached provisions of the Act and, if so, what the appropriate regulatory penalty should be. The Commission did not consider or make any determinations about the Oei Defendants' civil liability to the plaintiff. Further, it did not touch at all upon the role of the other defendants. In the circumstances, there is insufficient alignment between the two proceedings to invoke the abuse of process doctrine: *Hamelin v. Davis* (1996), 18 B.C.L.R. (3d) 85 (C.A.) at paras. 41-45, leave to appeal ref'd (1997), 211 N.R. 320n (S.C.C.).

Conclusion

- [33] The plaintiff's application is dismissed. Costs will be in the cause.

"Skolrood J."

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